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Supreme Court, U.S.
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No. 03-408

IN THE

Supreme Court of the United States

LORENA DADDARIO, AS PERSONAL REPRESENTATIVE OF FRANCIS E. DADDARIO,

Petitioner,

v.

THE CAPE COD COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

BRIEF IN OPPOSITION

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Dated: October, 2003

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STATEMENT OF THE CASE

Petitioner's statement of "Material Facts" overlooks or misstates several important points. The first and most critical of these is that the Cape Cod Commission ("Commission") denied Petitioner only the specific mining project proposed to the Commission. Petitioner does not identify any aspect of the Commission's decision, or the Regional Policy Plan (which guided the Commission's review process), that categorically prohibits Petitioner from extracting sand and gravel from his property. Despite Petitioner's urgings, the Supreme Judicial Court did not accept Petitioner's argument that the mining configuration he proposed is the only viable means of extracting sand and gravel from his property. *Daddario v. Cape Cod Comm'n*, 425 Mass. 411, 417 (1997) (*see* Petition for Writ of Certiorari ("Pet.") Appendix ("App.") at 29a).

Petitioner instead argues that the alternative proposals advanced by the Commission's staff during the review process were "facially infeasible," because those proposals called for mining within the 200-foot buffer required by the Falmouth bylaw. (Pet. at 5.) However, as noted by the Supreme Judicial Court in its decision, this buffer requirement can be waived with the assent of the applicant's abutter,[1] thereby undermining any arguments he makes about the feasibility of the Commission's proposals.

Petitioner claims that his estimate of the value of his land for sand and gravel was "unchallenged." (Pet. at 6.) Yet, the trial judge did not adopt the

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[1] The property abutting this portion of Petitioner's property is also a sand and gravel pit. Quite logically, the Commission's staff concluded that the buffer requirement made little sense where adjoining properties would both involve sand and gravel mining, and left it to Petitioner to obtain the consent of his abutter to waive the buffer requirement. Petitioner, having previously sued his abutter to block a special permit for mining sand and gravel on that adjoining property, was apparently unwilling to seek that waiver.

landowner's evidence as to value. The Commission's evidence, from a professional geologist and real estate appraiser, indicated that (a) given the absence of any geological borings to establish the quantity and quality of the reserve, the economic feasibility of mining was speculative, (b) a prudent investor would not pay for unproven reserves, and (c) the highest and best use of the property was residential. The trial judge made no findings as to (a) the value of the property for mining, or (b) specific "before-" and "after-imposition" values.

Petitioner incorrectly asserts that the Supreme Judicial Court failed to consider his argument that he "owned a separate and distinct mining estate recognized for takings purposes by state law." (Pet. at 6.) To the contrary, the Supreme Judicial Court specifically considered and rejected that argument, stating that the taking analysis must consider "the property as a whole." (Pet. App. at 28a.) Significantly, the Supreme Judicial Court relied on this Court's decision in *Penn Central Transp. Co. v. New York City*, 483 U.S. 104, 130-31 (1978), to support rejection of Petitioner's argument on this issue. As Petitioner holds the fee simple absolute title to his property, the facts of this case provide no basis for this Court to revisit the established precedent of *Penn Central*.

REASONS FOR DENYING THE WRIT

I. This Court already denied Petitioner's 1997 Petition for Certiorari, and the current Petition is merely a recitation of the 1997 Petition that does not merit granting the Writ.

What is ostensibly an appeal of the Land Court's Remand Order is, in reality, a second appeal of the Supreme Judicial Court's opinion. In his most recent Petition for Certiorari, Petitioner Daddario states that he "[p]etitions this Court for a Writ of Certiorari to review the decision of the Supreme Judicial Court of the Commonwealth of Massachusetts entered on July 11, 1997." (Pet. at 1.) Some six years ago, this Court considered and denied a Petition for Writ of Certiorari for this very decision. *Daddario v. Cape Cod Comm'n*, 522 U.S. 1036 (1997). Following remand by the Supreme Judicial Court, the Land Court declined further consideration of the takings claim and granted the Commission's renewed motion to dismiss the remaining claims. *Daddario v. Cape Cod Comm'n*, 8 LCR 336 (2000) (Misc. Case. No. 215603). The Appeals Court of Massachusetts affirmed that dismissal on December 18, 2002 (56 Mass. App. Ct. 764), and the Supreme Judicial Court denied Petitioner's Request for Further Appellate Review on February 27, 2003. *Daddario v. Cape Cod Comm'n*, 438 Mass. 1110 (2003).

The current Petition makes no mention of the decisions on remand of the Land Court or Appeals Court of Massachusetts rejecting Petitioner's takings claim. Furthermore, Petitioner omits from the Petition Appendix the trial court decision he is appealing. Instead, the 2003 Petition is an almost-verbatim a reprint of the 1997 Petition. The 2003 Petition raises

four of the same issues raised in 1997,[2] in nearly identical fashion, while ignoring all of the issues subsequently raised on remand, specifically whether the Cape Cod Commission Act (1989 Mass. Acts c. 716) is void for vagueness, or whether Petitioner was denied equal protection of the laws. Although Petitioner does maintain his ripeness challenge, nothing in this Court's jurisprudence since 1997 warrants reconsideration of the ripeness issue.

The Petition thus fails on two grounds. First, Petitioner is barred from again challenging the 1997 Supreme Judicial Court decision, as this Court already ruled on (and denied) the 1997 Petition. Second, although Petitioner filed the current Petition within the 90-day period[3] set forth in Supreme Court Rule 13.1, Petitioner has not challenged any of the substantive grounds by which his claims were dismissed on remand. Accordingly, Petitioner has waived all challenges to the dismissal of his claims on remand, and there are no issues remaining for this Court to review.

II. Petitioner's taking claim is not ripe, and consideration of the claim by this Court would be premature and unnecessary.

Even if the Petition were procedurally sound, *see supra*, the taking claim is still not ripe for review. This Court has repeatedly held that "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has

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[2] Petitioner has abandoned one issue raised in the 1997 Petition: whether the denial of a single land use permit application is sufficient to render Petitioner's regulatory takings claim ripe for judicial review.

[3] That period being measured from February 27, 2003, the date the Supreme Judicial Court denied Petitioner's Request for Further Appellate Review.

reached a final decision regarding the application of the regulations to the property at issue." *Williamson Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985); *accord, e.g., MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351 (1986) ("Our cases uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it."). This rule "responds to the high degree of discretion characteristically possessed by land-use boards in softening the strictures of the general regulations they administer," which makes it particularly difficult for a court to assess the extent of development that will be permitted simply through inspection of the pertinent statutes and regulations. *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 738 (1997). "Until regulatory ... agencies exercise their full discretion in considering development plans for the property ... the extent of the restriction on property is not known and a regulatory taking has not yet been established." *Palazzolo v. Rhode Island*, 533 U.S. 606, 621 (2001); *accord, Suitum* 520 U.S. at 733-39.

Relying on established federal and state precedents, the Supreme Judicial Court properly concluded that Petitioner had not shown that the Commission rejected anything more than his most-preferred mining plan. *See Daddario*, 425 Mass. at 414, 417,*citing, inter alia, MacDonald*, 477 U.S. at 347, 351-53 & n.8, n.9 (taking claim dismissed where only one subdivision plan submitted and rejected, because possibility existed that less intensive development would be permitted); *Williamson*, 473 U.S. at 186-88, 194 (where landowner failed to seek further relief after proposal rejected, agency had not "arrived at a final, definitive position" that would

"conclusively determine" whether developer was denied all reasonable beneficial use of property).[4]

Petitioner asserted that the Commission's denial of a single application for his mining proposal was sufficient to establish ripeness for a taking claim, despite his failure to propose any alternative uses or development configurations. The Supreme Judicial Court clearly rejected this position by finding (i) that the Commission's denial of the permit "did not preclude less extensive sand and gravel operations," and (ii) that Petitioner could not base his taking claim solely on the impact of regulation on the value of his property for sand and gravel mining alone where (as the record below showed) the property had "other valuable uses" and had "substantial value even without a permit to remove sand and gravel." *Daddario* 425 Mass. at 416-18, n.4 & n.5, *citing, inter alia, Moskow v. Comm'r of Envtl. Mgmt.*, 384 Mass. 530, 533-34 (1981) (taking claim requires analysis of

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[4] *See also Penn Central*, 438 U.S. at 136-37 (claim unripe after rejection of one plan, because no approval sought for any other); *Good v. United States*, 39 Fed. Cl. 81, 102-03 (1997) (ripeness doctrine requires good faith effort by developer to negotiate with permitting agency after initial denial), *aff'd*, 189 F.3d 1355 (Fed. Cir. 1999); *Southview Assoc., Ltd. v. Bongartz*, 980 F.2d 84, 98 (2nd Cir. 1992) (claim unripe even after state supreme court affirmed permit denial, because developer not precluded from submitting another plan for less intensive development in less critical areas of property). *Cf. Suitum*, 520 U.S. at 729-33 (1997) (claim ripe where agency had determined that landowner's property could not be developed or used for any productive purpose); *Palazzolo*, 533 U.S. at 625-26 (claim ripe and no further applications required where application from an owner and denial by state agency makes clear the extent of development permitted); *City of Monterey v. Del Monte Dunes at Monterey Ltd.*, 526 U.S. 687, 698 (1999) (city's rejection of five proposals and nineteen different site plans sufficiently final to render claim ripe for review); *accord Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 479 (2001) (issues deemed ripe when they would not benefit from any further factual development and when the court would be in no better position to adjudicate the issues in the future than it is now).

rights in entire parcel, not in discrete segment); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 496-99 (1987) (restricting mineral extraction not a taking if property as a whole retains substantial value); *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 295-97 (1981) (same). *See also Andrus v. Allard*, 444 U.S. 51, 65 (1979) (destroying one "strand" of owner's "bundle" of property rights is not a taking).

III. Prudential ripeness is jurisdictional in nature and may be raised *sua sponte* by an appellate court.

Petitioner asserts that ripeness should not be an issue for judicial consideration in this case. This argument is without legal or factual merit. The function of the ripeness doctrine is to determine whether a party has brought an action prematurely, and counsels judicial abstention until such time as a dispute is sufficiently concrete to satisfy the constitutional and prudential requirements of the doctrine. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967), *overruled on other grounds*, *Califano v. Sanders*, 430 U.S. 99 (1977). Ripeness principles serve in part to protect the courts from involvement in litigation that might turn out to be unnecessary if the administrative process alleviates the plaintiff's concern. *See, e.g., Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 736 (1998); *Federal Trade Comm'n. v. Standard Oil Co.*, 449 U.S. 232, 242 (1980). Adherence to those principles also ensures that, if judicial involvement is ultimately required, the nature and practical consequences of agency policy will be clear to the reviewing court. *See, e.g., Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 164 (1967) ("judicial appraisal of [the relevant] factors is likely to stand on a much surer footing in the context of a specific application of this regulation than could be the case in

the framework of the generalized challenge made here").

Petitioner argues that "a regulatory agency's concession of prudential ripeness at trial must be binding ...." (Pet. at 15.) However, ripeness is a preliminary jurisdictional requirement for a constitutional taking claim. Contrary to Daddario's contention, the Commission did raise the ripeness issue at trial in the Land Court. *See* Defendant's Request for Rulings of Law, para. 16 (Mass. App. Ct. Appendix ("A.") 88). In any event, federal precedent agrees with the Supreme Judicial Court's holding that considerations of ripeness are sufficiently important that a court is required to raise the issue *sua sponte*, even though the parties do not.[5] There is simply no meritorious issue or federal conflict concerning ripeness that requires clarification by this Court.

IV. Beyond the procedural and ripeness flaws with the Petition, there has been no regulatory taking in this case.

Petitioner attempts to recast his claim as a categorical taking by arguing that, regardless of the remaining value of the property as a whole, he has been deprived of all economic value of his "mining estate," which he proposes as the property interest "denominator" against which he would measure the loss of value. Petitioner contends that his case furnishes this Court with an opportunity to resolve

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[5] *See e.g., Peachlum v. City of York*, 333 F.3d 429 (3rd Cir. 2003); *Adland v. Russ*, 307 F.3d 471, 490 (6th Cir. 2002), *cert. denied*, __ U.S. __, 123 S. Ct. 1909 (2003); *Orix Credit Alliance, Inc. v. Wolfe*, 212 F.3d 891, 895 (5th Cir. 2000); *Utah v. United States Dep't of the Interior*, 210 F.3d 1193, 1196 n.1 (10th Cir. 2000); *Nutritional Health Alliance v. Shalala*, 144 F.3d 220, 225 (2nd Cir. 1998); *Poland v. Stewart*, 117 F.3d 1094, 1104 (9th Cir. 1997); *Cheffer v. Reno*, 55 F.3d 1517, 1523 (11th Cir. 1995); *Felmeister v. Office of Attorney of Ethics*, 856 F.2d 529, 535 (3rd Cir. 1988); *Bergstrom v. Bergstrom*, 623 F.2d 517, 519 (8th Cir. 1980).

purported conflicts and inconsistencies in the decisions of circuit courts, state courts, and this Court itself as to the definition of the property interests at stake in regulatory takings cases. (Pet. at 8-11.) Neither contention has merit. This court's recent decision in *Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002) settled the denominator issue, as the Court stated that, in regulatory takings cases, a court must focus on the parcel as a whole and not disaggregate the property into segments. *Id.* at 331. "The starting point ... [should be] ... whether there [is] a total taking of the entire parcel; if not, then Penn Central [is] the proper framework." *Id.*

Petitioner's efforts to focus his takings claim on separate "mineral estate" ignores the full extent of his title. Petitioner owns the entire fee simple title to his land (acquired in 1964, thirty years before he applied for a special permit for sand and gravel mining). This case does not involve an attempt to exercise mineral rights acquired separately from the underlying title; there simply is not, and never was, a separate "mineral estate."[6] As both the trial court and the Supreme Judicial Court perceived, what Petitioner describes as his "mineral estate" is simply his desire to use the property in a particular manner, and to a particular extent, even though many other economically viable options are available to him.

Petitioner's claim of a conflict between federal circuits and state courts regarding the denominator issue ignores the point that property rights are defined by state law. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980), *citing Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). Petitioner cites *Whitney Benefits, Inc. v. United*

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[6] Petitioner does not dispute that his fee simple absolute title comprehends subsurface, surface, air, and water rights, and any other beneficial interest appurtenant to the land.

States, 926 F.2d 1169, 1172 (Fed. Cir. 1991) as being in direct conflict with the Supreme Judicial Court's holding. While Petitioner argues that the estate against which loss is to be measured for takings purposes is the mineral estate, that rule only obtains "where state property law recognizes separate mineral and surface estates." (Pet. at 10) (citing *Whitney Benefits*, 926 F.2d at 1174). Neither the Massachusetts courts nor the legislature has ever established such a law.[7] Accordingly, because Petitioner owns the entire fee simple, the property as a whole is the controlling denominator.

Petitioner also points to cases from other state courts, all of which fail to support his claim to a separate mineral estate when none is recognized by state law. *See Machipongo Land & Coal Co. v. Commonwealth*, 799 A.2d 751, 768 (Pa. 2002), *cert. denied*, __ U.S. __, 123 S. Ct. 486 (2002) ("[f]ollowing Tahoe-Sierra, there can be no dispute that the 'property as a whole' rule remains controlling"); *Zealy v. City of Waukesha*, 548 N.W. 2d 528, 533 (Wis. 1996) (finding that the property at issue is entire 10.4-acre parcel). *Cf. State ex rel. R.T.G., Inc. v. State*, 780 N.E. 2d. 998, 1008 (Ohio 2002) (finding that, where Ohio recognizes a separate mineral estate, the surface rights are nothing more than an impediment to acquiring the coal).

Casting about for favorable federal precedent, Petitioner places heavy emphasis on *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995), which he asserts recognizes the existence of a separate mineral estate. He asks this Court to adopt and apply his interpretation of *Florida Rock*, thereby reversing the Supreme Judicial Court's "inconsistent" decision. The Commission respectfully suggests (a) that the value of

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[7] Petitioner cites no Massachusetts statute or reported case that recognizes the existence of a separate mineral estate.

the non-mineral estate in *Florida Rock* was so insubstantial as to preclude any comparison to Petitioner's land, and (b) that, if this Court had been inclined to review *Florida Rock*, it would have allowed a writ of certiorari, a step that it declined to take. *Id.*

Petitioner's "mining estate" argument is further undercut by a factual flaw. The Supreme Judicial Court expressly concluded that Petitioner has not lost the ability to mine sand and gravel from his land as a result of the Commission's decision. (Pet. App. at 29a) ("This denial did not preclude less extensive sand and gravel operations."). Only a single, particular plan of excavation was rejected. Nothing in the Regional Policy Plan prohibits sand and gravel mining. Petitioner remains free to seek a permit for a differently configured mine. There is neither a factual nor a legal basis for a claim of a categorical taking, regardless of the denominator.

Petitioner seeks support for his claim in the discussion of the "denominator" issue in *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003, 1016-17, n.7 (1992). Although footnote 7 in *Lucas* raises the possibility of separable property interests, it does not reject the *Penn Central* formulation; it merely suggests that the selection of a denominator might depend on "how the owner's reasonable expectations have been shaped by the State's law of property." In view of the full array of property interests inhering in Petitioner's fee simple absolute title and the variety of valuable alternative development possibilities that remain for the property, the question raised in *Lucas*'s footnote 7 finds as little application here as it did in *Lucas*.

By considering the value of the property as a whole when evaluating Petitioner's takings claim, the Supreme Judicial Court followed this Court's prior holdings. In *Penn Central*, 438 U.S. at 130-31, this Court rejected the argument that the airspace above

Grand Central Terminal should be considered as a separate and discrete property interest:

> "'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole . . . ."

In later decisions, this Court has reiterated that property rights (whether real, personal, or intangible) are to be viewed "as a whole" when analyzing regulatory taking claims. *See Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 643-645 (1993) (no taking found where pension-plan liability imposed on withdrawing employer is 46% of net worth); *Keystone*, 480 U.S. at 497-98 (coal required to be left in place not defined as separate segment of property for taking analysis); *Andrus* , 444 U.S. at 65-66 (where owner possesses full "bundle" of property rights, destruction of one "strand" not a taking, because aggregate must be viewed in entirety).[8]

Because the Commission did not effect a categorical taking by denying all economically beneficial or productive use of Petitioner's land, the Supreme Judicial Court considered whether

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[8] *See also Villas of Lake Jackson, Ltd. v. Leon County*, 121 F.3d 610, 614 (11th Cir. 1997) (regulatory deprivation of single use of real property must be considered in light of remaining use of property as a whole). *Cf. Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (permanent physical occupation is most serious invasion of property interests, because government takes not a single strand, but a "slice of every strand" from bundle of property rights).

government regulation nonetheless so affected the use of the land as to amount to a taking. That court applied the factors identified in *Penn Central*: "the economic impact of the regulation on the claimant," "the extent to which the regulation has interfered with distinct investment-backed expectations," and "the character of the government action." (Pet. App. at 27a) (*quoting Penn Central*, 438 U.S. at 124). The court recognized that the analysis of regulatory taking claims is fact dependent, involving "essentially ad hoc, factual inquiries." (Pet. App. at 28a) (*quoting Penn Central*, 438 U.S. at 124). Looking primarily at the economic impact of the regulation, the Supreme Judicial Court concluded that the record did not support the trial judge's finding of a taking, because the property retained "substantial value." The Commission's rejection of Petitioner's particular plan did not foreclose other sand and gravel operations; the Commission's staff displayed a willingness to allow less extensive mining operations, and indeed, proposed alternative plans to Petitioner (one alternative that Petitioner declined to consider would have allowed sand and gravel extraction on twenty-five acres, in comparison with the thirty-two acres desired by Petitioner). (Pet. App. at 29a.) Furthermore, evidence at trial supported the Supreme Judicial Court's finding that the property had substantial value for other uses allowed as-of-right under municipal zoning, including residential development.[9] Although the trial judge made no specific finding on the extent to which the Commission's rejection of Petitioner's proposal affected the property's value, the trial court (and the Supreme Judicial Court on appeal)

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[9] The Commission's appraisal expert testified that the property was worth $550,000 to $600,000 if developed for residential use. Petitioner's expert testified that the property would be worth $465,000 even if limited to use as conservation land. As of 1996, the property's assessed value for taxation was $474,600. A. 1495, 1503.

concluded that the property retained substantial value for uses other than sand and gravel mining. *Id.*

The Supreme Judicial Court did not address the remaining "prongs" of the *Penn Central* test, but if the court had done so, the results would have reinforced its conclusion. The Commission's decision did not unreasonably interfere with Petitioner's "distinct investment-backed expectations." Petitioner asserts that he acquired the property in 1964 for the primary purpose of mining (Pet. at 4), but leaves unexplained the thirty-year delay before he sought a permit to carry out that activity. Assuming that Petitioner's expectations also included appreciation in land values, that expectation has been amply fulfilled. He purchased the property for roughly $45,000, and shortly thereafter recouped his initial investment by selling a small portion of the property for that same price. The property's current value, even if the land were not used at all for sand and gravel mining, is more than ten times Petitioner's initial investment.[10] *See supra* at n.7. The Commission's decision does not prevent Petitioner from profiting from his ownership and obtaining a reasonable return on his investment. *See Penn Central*, 438 U.S. at 136. *See also Florida Rock Indus., Inc. v. United States*, 791 F.2d 893, 905 (Fed. Cir. 1986) (*Florida Rock II*) (taking analysis should consider impact of regulation on owner's opportunity to recoup investment).

Petitioner should have expected, when he purchased the land, that sand and gravel mining would be subject to government regulation. Although the Commission did not exist in 1964, the type of

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[10] After he purchased the property, but before Petitioner applied for the sand and gravel mining permit, he had modest expectations for the value of the property. In 1989, Petitioner sought and obtained an abatement of the property's assessed value from $770,000 to $304,000. That abated value was well below the 1996 assessed value and the current value estimates discussed *supra* at n.9.

land-use regulation at issue here is hardly novel. Massachusetts has long authorized municipal zoning as well as general town by-laws regulating sand and gravel mining. *See* Mass. Gen. Laws ch. 40, § 21, cl. (17) (2002); *Butler v. East Bridgewater*, 330 Mass. 33, 36-37 (1953) (upholding municipal bylaw regulating sand, gravel, soil, and loam removal). *See also Goldblatt v. Hempstead*, 369 U.S. 590, 592-96 (1962) (town by-law barring earth excavation not a taking). The Commission's review of developments of regional impact to ensure their conformance to the county-enacted Regional Policy Plan is comparable to forms of municipal land-use regulation which predated Petitioner's property acquisition.

Analysis of the third *Penn Central* factor, "the character of the government action," also supports the conclusion that no regulatory taking has occurred. The government activity here is not comparable to the examples offered in *Penn Central*, in which government agencies undertook periodic physical intrusions, including overflights, gun firings, and floodings, that effectively resulted in the property being "taken" for public purposes. *Penn Central*, 438 U.S. at 124, 128.

The Commission's denial of Petitioner's mining proposal cannot be characterized as a regulatory taking, when that decision is measured against each of the categories of takings that this Court has recognized. A landowner cannot prove a taking simply by showing that he has filed a single unsuccessful application to exploit a property interest that he previously believed to be available for development. *Penn Central*, 438 U.S. at 130. The Supreme Judicial Court correctly concluded that Petitioner's constitutional rights had not been violated. Petitioner's taking claim is without merit, and his Petition for a Writ of Certiorari should be denied.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully Submitted,
CAPE COD COMMISSION

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